



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CRIMINAL APPLICATION NO. 249 OF 2011

WYCLIFFE MKHOMBA

SHIVAILU..... APPLICANT

VERSUS

REPUBLIC.....

RESPONDENT

RULING

(1) The applicant was on 15.11.2011 charged before the Senior Resident Magistrate's Court in Mombasa with causing grievous harm contrary to section 234 of the Penal Code and convicted on a plea of guilty and sentenced to 5 years imprisonment. The applicant contended that his response to the charge to the effect that **"it was true"**, which he had sought to explain by accompanying statements which the court did not record, should not have resulted in the entry of a plea of guilty. The applicant therefore wishes to have his plea changed to that of **"not guilty"**, and taking the view that an appeal from the magistrate's decision was denied under section 348 of the Criminal Procedure Code, the applicant filed a Notice of Motion dated 22.12.2012 seeking revision under ss. 356, 364, 365 and 367 of the CPC.

(2) The Notice of Motion principally sought an order for revision of the conviction and sentence of the magistrate's court of 15.11.2011 to permit the applicant to take a fresh plea before the court and, in the meantime, for an order admitting the applicant to bail. The Notice of Motion was supported by a statement and a supporting affidavit of the applicant sworn on 22.12.2012. The Director of Public Prosecutor though served with the application did not file a reply but both sides were heard in oral submissions before the court on 24.1.2012 when ruling was reserved for the 6.2.2012.

(3) According to the statement accompanying the Notice of Motion for revision, the applicant relied on three main grounds as follows:

1. That the learned Senior Resident Magistrate erred in law and in fact in failing to record the statements made by the accused person which accompanied the response of **"it is true"** as provided under section 207 of the Criminal Procedure Code.

2. The learned Senior Resident Magistrate erred in law and in fact in not interpreting the accompanying statements together with the fact of negotiations having taken place for compensation thereof to enter a plea of **"not guilty"**.

3. The learned Senior Resident Magistrate erred in law and in fact when he failed to call for (sic) to give a chance to the accused person to provide explanation as to the reasons for the offence and further failing to refer the accused for psychiatric evaluation by competent medical examiner as no person in his right

mind would just accost another and cut his or her hands”.

4. In his supporting affidavit, the applicant deponed that by his response that it was true to the question put to him by the court clerk on plea taking, he was admitting that a fight did take place in which he cut the complainant’s fingers but that he had tried to explain how the fight took place in his house and that he was defending himself from the attacker. The applicant said that he thought that **“after I had said it was true that I had cut the complainant’s fingers I would be granted an opportunity to explain the reason why and how it happened”**. He also asserted that the magistrate **“should have recorded the statements I made in defence of the injuries I inflicted upon the complainant”**.

5. The record of the court proceedings is as follows:-

“charge read over and explained to the accused person who replies in Kiswahili : -

It is true.

Facts

On the 10.9.11 at Mlima Estate in Likoni district the complainant Geoffrey Ibwaka was heading home from his place of work. When he reached the gate he was confronted by the accused who accused him of having an affair with his wife. Before the complainant could say anything the accused produced a panga hidden under his clothing and when the applicant raised his hands to plead the accused chopped off his two fingers on the left hand. The small finger and the ring finger were cut off. The accused then ran away and left the complainant bleeding in pain. The members of the public responded to the complainant’s cries and he was taken to Likoni station where he reported the complainant was referred to hospital for treatment. Later he was issued with P3 form which was filled and the injuries were assessed as greivous harm. Later the accused who was hiding was found and later taken to Likoni station and after investigations he was charged with the offence. I wish to produce the P3 as an exhibit (Ex.1).

J. Omburah, SRM

Accused

The facts are true.

J. Omburah, SRM

Court

Plea of guilty and accused convicted on his own plea of guilty.

J. Omburah, SRM

Prosecution

He may be treated as a first offender.

J. Omburah, SRM

MITIGATION

We had agreed to pay the complainant Kshs.15,000/= and I have paid him Kshs.5,000/= as I have chopped off his hands.

Court

I have considered the circumstances of the case and the fact that the complainant lost his fingers under circumstances that were not warranted at all and that this left him with a permanent mark. Even though the accused is a first offender he committed the offence deliberately and he must bear the consequences. I will therefore sentence the accused to serve 5 years imprisonment. Right of Appeal 14 days.

J. Omburah, SRM

15/11/11.”

6. Against this background, counsel for the applicant, Mr. Nyawinda, submitted that the magistrate’s alleged failure to record the explanations of the accused as to the circumstances of the offence contravenes the provisions of section 207 of the Criminal Procedure Code and that these explanations together with the fact of attempted negotiations as set out in the mitigation should have led the magistrate to enter a plea of not guilty. The complainant’s counsel requested the court to release the applicant on bail pending the hearing of revision.

7. Counsel for the State, Mr. Gioche, opposed the application for revision and bail pending revision. He observed that the facts of the charge were explained to the accused in a language that he understood and the court accepted this information as the truth of the facts. The accused was therefore convicted on his own plea and sentenced to imprisonment for 5 years which, in counsel's view, was too lenient having regard to the stated penalty for causing grievous harm which is life imprisonment. Counsel considered that the court must have taken into account the accused's mitigation in passing the lenient sentence. He objected the release of the applicant on bail pending revision as the court may on revision enhance the sentence, which possibility rendered the accused likely to abscond.

8. I have considered the rival contentions of the applicant and the State against the record of the court's proceedings and find as follows:

(a) Section 207 of the Criminal Procedure Code requires the court at plea taking to record the accused's answer **"as nearly as possible in the words used by him"** and to convict and sentence him, **"unless there appears to it sufficient cause to the contrary"**. The record of the proceedings shows that there was English/Kiswahili interpretation and that the accused responded in Kiswahili. The accused's answer is however given in English as **"it is true"**, and the court therefore failed to comply with the section with regard to the language used. However, as the applicant confirms that he said it was true, nothing turns on that aspect of the court's record.

(b) Of greater moment is the allegation that the court failed to record as required by section 207 of the CPC the accused's explanatory statements qualifying his **"it is true"** answer. Such explanations, if they were made, would amount to the **"sufficient cause to the contrary"** to justify a plea of not guilty. But were the statements in fact made and not considered by the court? In the absence of the proposed audio recording and transcription of court proceedings it is not possible to ascertain whether the accused made the alleged explanatory statements and the court failed to record them. [I take this opportunity to urge the quick adoption of the digital audio recording and transcription system of the court proceedings].

At present even an affidavit by the accused does not help because it is may contain mere allegations which, not being tested against an affidavit by the court which took the plea may be unreliable. Even if such an affidavit was proper and forthcoming from the trial magistrate, the same may contain only opposite averments to those of the accused's affidavit making it a case of the accused's word against the trial courts. In such circumstances the revision court must consider the allegations against all the circumstances of the case as recorded in the trial court's proceedings. At the outset, I note that the accused's mitigation on the alleged negotiations with the applicant and part payment of Kshs.5,000/= out of the agreed compensation of Kshs.15,000/= is recorded. No explanation or suggestion is given as to why the court would record the mitigation and not the more important explanatory statements at the plea taking. I have also noted that in his affidavit, the applicant does not claim to have actually made the explanatory statements to his **"it is true"** answer but rather that **"I tried to explain"** and **"I wanted to explain"**, and that he thought that **"after I had said it was true that I had cut the complainant's fingers I would be granted an opportunity to explain the reason why and how it happened"**.

Accordingly, I do not accept that the applicant made any explanatory statements which the trial magistrate failed to record.

(c) There is however an obligation on the part of the court to afford the accused an opportunity to explain his answer to the charge and to determine whether the statements made on that occasion affect the unequivocalness of the plea. An accused person should only be convicted upon an unequivocal plea of guilty construed from the accused's admission of the truth of the charge in his own words in response to a sufficient detailed information of the charge in a language that he understands. That must be the true import and intent of the constitutional right to fair trial with its components of rights **"to be presumed innocent until the contrary is proved; to be informed of the charge, with sufficient detail to answer it; and to adduce and challenge evidence"**, under Article 50 of the Constitution. See also **Kato v. R (1971 E.A. 542)**. The trial court cannot rush or appear to rush to convict an accused person on his mere acceptance that the event the subject of the charge happened; it must establish that the event took place in circumstances amounting to the offence the commission of which the accused admits, and for which there

is no lawful excuse or defence. Where, as in the present case, an accused is unrepresented by advocate at the plea taking, the court should enquire from the accused whether he wishes to state anything further than the affirmation of the charge and the facts of the charge as read to the court by the prosecutor, and his answer to his inquiry should be recorded in terms of section 207 of the Criminal Procedure Code. In the present case, the record shows that the facts on the charge were read, and presumably interpreted to the accused in Kiswahili; and the accused is shown as having responded by simply stating that **“The facts are true”**. Had the trial court given the accused an opportunity to be heard on the circumstances surrounding the offence by enquiry whether the accused wished to state anything further to his admission of the facts, the accused would have stated as he claims in paragraphs 3-7 of his affidavit that there had been a fight between him and the applicant which took place at the accused’s house and that he had cut the complainant’s fingers in self-defence **“as a result of being overwhelmed by the attackers”**. With such statements accompanying his admission of the charge, the court would no doubt have entered a plea of not guilty. I therefore find that the accused’s right to fair trial was violated by denial of opportunity to answer to the charge or defend himself by explaining the circumstances in which the alleged offence was committed.

(d) The fact recorded in the mitigation that the complainant and the accused had negotiated a settlement and part payment of the compensation sum paid should have put the court into inquiry as to existence of **“sufficient ground for permitting the complainant to withdraw his complaint”** under section 204 of the Criminal Procedure Code, which is in terms that: -

“If a complainant, at any time before a final order is passed in a case under this part, satisfies the court that there are sufficient grounds permitting him to withdraw his complaint, court may permit him to withdraw it and should therefore acquit the accused”.

In the circumstances, the court should have enquired from the accused whether the complainant wished to withdraw the charge in view of the negotiations. The court would then change the plea of guilty entered earlier into one of not guilty pending any application for withdrawal of the complaint, if so desired, by the complainant, as a plea of guilty may be changed any time before sentence or final order. See **KIOKO V. R C.A. CR. APPEALS 12 & 112 OF 1982, (1983) KLR 289**.

(9) Accordingly, I find that the proceedings of the trial were defective for not giving the accused an opportunity to answer to the charge fully by explaining the circumstances surrounding the cutting of the complainant’s fingers and for failing to take into account the mitigation which called for a plea of not guilty to facilitate withdrawal of the complaint by the complainant upon payment of agreed compensation by the accused.

(10) In accordance with section 364 (1) (a) of the Criminal Procedure Code and pursuant to section 354 (3) (a) (i) thereof, I set aside the conviction and sentence in the Chief Magistrate’s Court Criminal Case No. 3517 of 2011, Republic versus Wycliffe Mkhomba Shivailu, entered and passed on the 15.11.2011 and order that the accused be tried by a court of competent jurisdiction other than the previous trial court.

(11) I had declined to release the accused on bail pending the decision in this revision in view of his imprisonment term for 5 years and the possibility of enhancement on revision. In view of the orders that I have made the accused may make his bail application before the trial court.

Dated and delivered this 10th day of February, 2012.

EDWARD M. MURIITHI
JUDGE

In the presence of

.....for the Applicants
.....for the Respondents
.....court clerk.

EDWARD M. MURIITHI
JUDGE